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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

MERCEDES HERRERA,

Plaintiff,

v.

LCS FINANCIAL SERVICES
CORPORATION and OCWEN
LOAN SERVICING LLC,

Defendants.

Case No. C09-02843 TEH

**DEFENDANT OCWEN LOAN
SERVICING, LLC'S NOTICE OF
MOTION AND MOTION TO
DISMISS COMPLAINT PURSUANT
TO F.R.C.P. 12(b)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Hearing Date: August 31, 2009
Time: 10:00 a.m.
Courtroom: 12
Judge: Hon. Thelton E.
Henderson

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 31, 2009, at 10:00 a.m., or as soon thereafter as counsel may be heard before the Honorable Thelton E. Henderson, in Courtroom 12, 19th Floor of this Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, defendant Ocwen Loan Servicing, LLC ("Ocwen"), will appear and move the Court for an order dismissing the claim asserted against it

1 in plaintiff Mercedes Herrera's complaint, pursuant to Rule 12(b)(6) of the Federal
2 Rules of Civil Procedure, on the ground that the complaint fails to state a claim for
3 relief.

4 This Motion is based upon this Notice, the attached Memorandum of Points
5 and Authorities, the argument of counsel, all of the pleadings and other papers on
6 file in this action, and such other matters as may be presented at the hearing on this
7 Motion or prior to the Court's decision.

8
9 Dated: July 27, 2009

BRIAN P. BROOKS
ELIZABETH LEMOND MCKEEN
JILLIAN B. ALLEN
O'MELVENY & MYERS LLP

12
13 By: /s/ Elizabeth Lemond McKeen
14 Elizabeth Lemond McKeen
15 Attorneys for Defendant
16 OCWEN LOAN SERVICING, LLC
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Even accepting the allegations of plaintiff Mercedes Herrera's complaint as true, it is clear that plaintiff has no claim against defendant Ocwen Loan Servicing, LLC ("Ocwen") for violation of California's Rosenthal Fair Debt Collection Practices Act, Cal. Civil Code § 1788, *et seq.* (the "CFDCPA"). Among other things, this California statute (which borrows certain standards from the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA")), prevents false, deceptive, or misleading statements in connection with collection of a debt; unfair or unconscionable collection methods; and the collection of any amount not authorized by agreement or permitted by law. The sole basis for plaintiff's allegation that Ocwen violated this statute is her contention that, as a result of California's anti-deficiency statute, it was false or misleading for Ocwen to state that there is a debt at all or to request that she make a voluntary payment. Specifically, plaintiff contends that California Code of Civil Procedure Section 580b, which provides that "no deficiency judgment shall lie in any event after a sale of real property," simply erased her debt as to her unpaid second mortgage without a trace and "barred [Ocwen] from claiming this debt." (Compl. ¶ 15.) As a result, she claims that Ocwen violated the CFDCPA, which prohibits false representations in connection with debt collection and misrepresentations regarding the legal status of a debt, when it did no more than communicate to her that her second mortgage was in default and request payment. Plaintiff is mistaken.

According to the complaint, plaintiff financed the purchase of a single-family condominium in Fremont, California with two home mortgage loans originated by New Century Mortgage Corporation in October 2005. (Compl. ¶¶ 8-9.) Following the origination of these loans, defendant Ocwen became the servicer

1 of plaintiff's second mortgage. (*Id.* at ¶ 11.) In June 2008, after plaintiff
 2 admittedly defaulted on her mortgages, the holder of the first-lien mortgage
 3 foreclosed. (*Id.* at ¶¶ 11-13.) Plaintiff alleges that, following the foreclosure on
 4 the first mortgage, Ocwen "demanded payment in full from Ms. Herrera on the
 5 second mortgage." (*Id.* at ¶ 15.) Plaintiff alleges that Ocwen sent her three
 6 communications, which form the basis of her complaint: (1) a July 1, 2008 letter
 7 which "stated that the second mortgage was now in default," (2) a July 17, 2008
 8 communication "seeking payment of the second mortgage," and (3) an August 18,
 9 2008 letter "informing her that the servicing rights of the second mortgage had been
 10 assigned to [co-defendant] LCS Financial Corp." (*Id.* at ¶ 16.)¹ Importantly,
 11 plaintiff does not allege that Ocwen sought a deficiency judgment or threatened to
 12 seek such a judgment.

13 Plaintiff's attempt to hold Ocwen liable for violation of the CFDCPA
 14 fails for the simple reason that Section 580b does not eliminate plaintiff's debt; it
 15 merely bars mortgagees from obtaining a deficiency judgment following a
 16 foreclosure. *See* Cal. Code Civ. Proc. § 580b. Therefore, Ocwen's requests that
 17 plaintiff pay the outstanding balance on her admittedly-defaulted second mortgage
 18 were not improper debt collection practices because they did not include any false
 19 statements or characterizations. Plaintiff concedes she defaulted on her second
 20 mortgage, so the statement that the mortgage was in default was by definition
 21 neither false nor misleading. Likewise, Ocwen's attempt to collect a debt that
 22 exists and was never repaid is not a violation of any statute by virtue of the fact that
 23

24 ¹ Copies of these communications are attached hereto as Exhibits A, B and C,
 25 respectively. As plaintiff has referenced these communications in the complaint,
 26 they are deemed incorporated by reference, and this Court may consider them in
 27 connection with its evaluation of the pleadings. *See Branch v. Tunnell*, 14 F.3d
 28 449, 454 (9th Cir. 1994), *cert. denied* 512 U.S. 1219 (1994) (documents whose
 contents are alleged in pleading may be considered in ruling on a 12(b)(6) motion,
 even though documents were not physically attached to pleading).

Ocwen would not be permitted to pursue a deficiency judgment for this arrearage. Because the allegations of the complaint, taken as true, show that Ocwen did not violate the CFDCPA as a matter of law, Ocwen hereby requests that the Court dismiss plaintiff's claim with prejudice.

ARGUMENT

I. PLAINTIFF HAS NOT STATED A CLAIM UNDER THE ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT BY ALLEGING THAT OCWEN REQUESTED PAYMENT ON A DEFAULTED MORTGAGE LOAN.

The CFDCPA incorporates various standards of the Federal Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. § 1692, *et seq.*, and provides that those subject to the CFDCPA must also comply with the federal statute. Specifically, California Civil Code § 1788.17 provides, in relevant part, that "every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j [of the FDCPA]." It is that section of the California statute that plaintiff claims Ocwen violated (though without specifying any particular subsection of the FDCPA that she believes gives rise to Ocwen's liability). (Compl. ¶ 34.) The ambiguity of plaintiff's pleading aside, the FDCPA generally prohibits, among other things, (1) false, deceptive, or misleading statements in connection with collection of a debt; (2) unfair or unconscionable collection methods; and (3) the collection of any amount not authorized by the agreement creating debt or permitted by law. *See* 15 U.S.C. §§ 1692e & 1692f. Notably absent from the complaint are any allegations describing the specific statements Ocwen made to plaintiff that were purportedly false, deceptive or misleading. Likewise, plaintiff makes no allegation that Ocwen sued or threatened to sue plaintiff for a deficiency judgment notwithstanding Section 580b. Instead, the sole basis of plaintiff's claim is her contention that, because Section 580b purportedly "barred [Ocwen] from claiming [plaintiff's] debt," Ocwen violated the

1 CFDCPA by stating that she was in default and requesting payment. However, as
 2 set forth below, the language of Section 580b is not so broad, nor does the
 3 CFDCPA require this result.

4 **A. California Code of Civil Procedure Section 580b Precludes**
 5 **Creditors From Pursuing A Deficiency Judgment — But It Does**
 6 **Not Erase The Outstanding Indebtedness Or The Fact Of The**
 7 **Default.**

8 Section 580b prevents a mortgagee from proceeding personally against
 9 the mortgagor to recover a deficiency after a foreclosure sale of real property
 10 securing a mortgage. *See, e.g., Schumacher v. Gaines*, 18 Cal. App. 3d 994, 999
 11 (1971) (holder of purchase money mortgage must “look solely to the security and
 12 no personal judgment may be recovered. The bar of Code of Civil Procedure
 13 section 580b applies against deficiency judgments for enforcement of the obligatory
 14 rights flowing from the promissory note secured by the deed of trust.”); *Jones v.*
 15 *Turnage*, 699 F. Supp. 795, 797 (N.D. Cal. 1988) (“Cal. Code Civ. Proc. § 580b
 16 prohibits any deficiency judgment from lying after a sale of real property for failure
 17 of the purchaser to complete his contract of sale, or under a deed of trust, or
 18 mortgage, on a dwelling, given to the vendor to secure payment of the balance of
 19 the purchase price of real property, or under a deed of trust or mortgage.”)
 20 Section 580b also precludes a junior lienholder from recovering a deficiency
 21 judgment after the senior lienholder has foreclosed on the property. *See Spangler v.*
 22 *Memel*, 7 Cal. 3d 603, 610 (1972). By depriving a creditor of a legal remedy other
 23 than the right to look to the security for the recovery of debt, Section 580b was
 24 intended to place the risk of inadequate security on a purchase money mortgagee.
 25 *See, e.g., Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 42 (1963). Precarious land
 26 promotion schemes are discouraged, for the security value of the land gives
 27 purchasers a clue as to its true market value.”); *Jack Erickson & Associates v.*
 28 *Hesselgesser*, 50 Cal. App. 4th 182, 185 (1996) (same). The statute “discourage[s]
 vendors from overvaluing the security and, where inadequacy of the security results

1 from a decline in property values during a general or local depression, ... prevent[s]
2 the aggravation of the downturn that would result if defaulting purchasers were
3 burdened with large personal liability.” *United States v. Haddon Haciendas Co.*,
4 541 F.2d 777, 782 (9th Cir. 1976).

5 By barring a mortgagee from recovering a deficiency judgment against
6 a mortgagor, Section 580b limits the judicial remedies available to a mortgagee.
7 This limitation, however, does not preclude a mortgagee from attempting to collect
8 the mortgage balance by other means, including by requesting voluntary payment
9 from the defaulting borrower. *See Hodges v. Mark*, 49 Cal. App. 4th 651, 657
10 (1996) (“Code Civ. Proc. § 580b prohibits only a deficiency judgment in the strict
11 sense, *i.e.*, a personal judgment against the debtor.”) In other words, despite
12 plaintiff’s contention to the contrary, Section 580b does not render her debt a legal
13 nullity or preclude Ocwen’s attempts to collect on that debt by requesting voluntary
14 payment.

15 That Section 580b does not extinguish a mortgagor’s debt is made clear
16 by the other legal consequences that a borrower faces following a foreclosure
17 proceeding on a defaulted loan. One such consequence is the negative impact of
18 the default and/or foreclosure on the mortgagor’s credit report. Under the Federal
19 Fair Credit Reporting Act (the “FCRA”), a lender is entitled to report a mortgagor’s
20 default following foreclosure to credit reporting agencies, so long as the lender
21 complies with the other requirements set forth under the FCRA for furnishers of
22 consumer information, including the requirement that all reported information be
23 complete, accurate and current. *See* 15 U.S.C. § 1681s-2, *et seq.*; *see, e.g.*,
24 *Sepulvado v. CSC Credit Servs.*, 158 F.3d 890, 892 (5th Cir. 1998) (noting that
25 under the FCRA, both the foreclosure and the remaining deficiency balance can be
26 included on a credit report for a period of seven years); *Johnson v. Wells Fargo*
27 *Home Mortg., Inc.*, 558 F. Supp. 2d 1114, 1117 (D. Nev. 2008) (mortgage servicer
28

1 continued to report consumer's default on real property mortgage loan following
2 foreclosure).²

3 Here, not only does plaintiff's debt on her second mortgage still exist
4 notwithstanding the foreclosure of her first lien, but Ocwen is entitled to report her
5 default to credit reporting agencies under the FCRA. In order to cure her default
6 and avoid the ill-effects associated with a tarnished credit report, plaintiff could
7 have chosen to pay the outstanding the balance of her mortgage loan – even though
8 Ocwen would not be permitted to obtain a deficiency judgment against her if she
9 failed to do so. Nothing in the language of Section 580 prevents Ocwen from
10 notifying plaintiff of her default and requesting payment; indeed, such a result
11 would be perverse, given that some individuals in her position might affirmatively
12 want to pay these amounts to minimize the impact on their credit reports. The law
13 should favor letting Ocwen communicate with these borrowers about the debt —
14 and the credit-reporting implications it will have — as long as Ocwen does not
15 threaten to take action that it is statutorily barred from taking.

16 **B. Ocwen's Request That Plaintiff Pay Her Defaulted Second**
17 **Mortgage Did Not Violate The CFDCPA, Even Though Ocwen Is**
18 **Barred From Obtaining A Deficiency Judgment.**

19 A creditor's attempt to pursue a debt that it could not sue the borrower
20 on does not, without more, violate the FDCPA (or its California analog). For
21 example, numerous authorities have held that a creditor is entitled to seek payment
22 of a time-barred debt. While the statute of limitations presents a procedural bar that
23 will prevent the creditor from obtaining an enforceable judgment, the creditor's
24 attempt to voluntarily collect the outstanding amount owed is not an FDCPA
25 violation. *See, e.g., Abels v. JBC Legal Group, P.C.*, 428 F. Supp. 2d 1023, 1027
26 (N.D. Cal. 2005) ("an attempt to collect on the time-barred debts, standing alone, is
not a violation of the federal FDCPA."); *Freyermuth v. Credit Bureau Servs.*, 248

27 ² California's Consumer Credit Reporting Agencies Act provides that a creditor
28 "may submit negative credit information concerning a consumer to a consumer
credit reporting agency." *See* Cal. Civ. Code § 1785.26, *et seq.*

1 F.3d 767, 771 (8th Cir. 2001) (“no violation of the FDCPA has occurred when a
2 debt collector attempts to collect on a potentially time-barred debt that is otherwise
3 valid.”); *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D 613, 616 (N.D. Ill.
4 2001) (same). Under the FDCPA, this result obtains even if the creditor does not
5 disclose to the debtor that the relevant debt is time-barred. *See Reese v. Arrow Fin.*
6 *Servs., LLC*, 202 F.R.D. 83, 92 (D. Conn. 2001) (finding that “[w]here debt
7 collectors have not threatened collection action, courts have not found Fair Debt
8 Collection Practices Act (FDCPA) violations based solely on the mailing of a
9 collection letter that does not affirmatively disclose that a debt is time barred or the
10 consequences of making payment or acknowledging the debt.”)

11 Like a statute of limitations, the enforceability bar of Section 580b does
12 not erase the existence of plaintiff’s loan balance. Plaintiff’s own allegations
13 demonstrate that she borrowed over \$86,000 that she has not repaid. (Compl. at
14 ¶ 15.) Section 580b merely provides that Ocwen cannot obtain a deficiency
15 judgment against her for that amount. But Ocwen’s statutory inability to obtain a
16 deficiency judgment against plaintiff does not make it an unfair debt collection
17 practice for Ocwen to inform her of the remaining loan balance and ask her to pay
18 that balance voluntarily. Inasmuch as plaintiff does not allege that Ocwen made
19 any threat to file a collection suit or to take legal action against plaintiff personally,
20 Ocwen’s notification to plaintiff that she is in default on the second mortgage loan
21 was neither false nor misleading. Likewise, as plaintiff’s debt continued to exist
22 even after the foreclosure sale of her home, Ocwen’s letter “seeking payment of the
23 second mortgage” was not unfair or unconscionable, nor was it an attempt to collect
24 an unauthorized amount. *See, e.g., Spira v. Ashwood Fin., Inc.*, 358 F. Supp. 2d
25 150 (E.D.N.Y. 2005) (granting summary judgment for debt collector against
26 debtor’s FDCPA claims because warning that debt would be reported to credit
27 bureau and statement that collector would pursue debt through all available means
28 were not abusive, deceptive, or threatening); *Davis. v. World Credit Fund I, LLC*,

1 543 F. Supp. 2d 953 (N.D. Ill. 2008) (granting creditors' summary judgment on
2 debtor's claims under the FDCPA where evidence established the existence of debt
3 and showed that the debtor owed debt); *Johnson v. AMO Recoveries*, 427 F. Supp.
4 2d 953 (N.D. Cal. 2005) (granting collection agency judgment on the pleading
5 against debtor's FDCPA claims because letters from agency did not make
6 objectively false statements).

7
8 **CONCLUSION**

9 For the foregoing reasons, Ocwen respectfully requests that the Court
10 dismiss plaintiff's claim against it with prejudice.

11
12 Dated: July 27, 2009

BRIAN P. BROOKS
ELIZABETH LEMONOND MCKEEN
JILLIAN B. ALLEN
O'MELVENY & MYERS LLP

15
16 By: /s/ Elizabeth Lemond McKeen
Elizabeth Lemond McKeen
17 Attorneys for Defendant
OCWEN LOAN SERVICING, LLC

PROOF OF SERVICE

I, Terry R. Grossman, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 610 Newport Center Drive, 17th Floor, Newport Beach, California 92660-6429. On July 27, 2009, I served the within documents:

**(1) DEFENDANT OCWEN LOAN SERVICING, LLC'S
NOTICE OF MOTION AND MOTION TO DISMISS
COMPLAINT PURSUANT TO F.R.C.P. 12(b)(6);
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF; and (2) DEFENDANT OCWEN
LOAN SERVICING, LLC'S [PROPOSED] ORDER
GRANTING MOTION TO DISMISS**



by transmitting via facsimile machine the document(s) listed above to the fax number(s) set forth below on this date at approximately _____m. The outgoing facsimile machine telephone number in this office is (949) 823-6994. The facsimile machines used in this office create a transmission report for each outgoing facsimile transmitted. A copy of the transmission report(s) for the service of this document, properly issued by the facsimile machine(s) that transmitted this document and showing that such transmission was (transmissions were) completed without error, is attached hereto.



by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Newport Beach, California addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.



by putting a true and correct copy thereof, together with an unsigned copy of this declaration, in a sealed envelope designated by the carrier, with delivery fees paid or provided for, for delivery the next business day to the person(s) listed above, and placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by First Legal Support Services, which is an express carrier.

1 ☐ by putting a true and correct copy thereof, together with an unsigned copy of this
2 declaration, in a sealed envelope, with Express Mail postage fully prepaid to the
3 person(s) listed above, and placing the envelope for collection and mailing today
4 with the United States Postal Service as an Express Mail item in accordance with
5 the firm's ordinary business practices. I am readily familiar with this firm's
6 practice for collection and processing of Express Mail correspondence for mailing
7 with the United States Postal Service. In the ordinary course of business, Express
8 Mail correspondence collected from me would be processed on the same day, with
9 Express Mail postage thereon fully prepaid, and placed for deposit that day with
10 the United States Postal Service by depositing it that same day in a post office,
11 mailbox, subpost office, substation, mail chute, or other like facility regularly
12 maintained by the United States Postal Service for receipt of Express Mail.

13 ☐ by causing the document(s) to be emailed or electronically transmitted to the
14 person(s) at the email addresses set forth below, pursuant to a court order or an
15 agreement of the parties to accept service by email or electronic transmission. I
16 did not receive, within a reasonable time after the transmission, any electronic
17 message or other indication that the transmission was unsuccessful.

18 ☒ by electronically filing via the CM/ECF system, and thereby serving all parties
19 registered to accept electronic service in this manner.

20
21 Noah Zinner, Esq.
22 Housing and Economic Rights Advocates
23 P.O. Box 29435
24 Oakland, CA 94604-0091

25 I declare under penalty of perjury under the laws of the United States that
26 the above is true and correct.

27 Executed on July 27, 2009, at Newport Beach, California.

28
/s/ Terry R. Grossman
Terry R. Grossman